

Centrelink Practice of Pursuing Overpayments Made Prior to Bankruptcy of Individuals

Centrelink's current practice is to pursue repayment of overpaid amounts from bankrupt individuals after such individuals have been discharged from bankruptcy. It is our understanding that Centrelink pursues these debts on the basis that section 153(2)(b) of the *Bankruptcy Act 1966 (Act)* does not release a bankrupt from a debt incurred by means of fraud. In many, if not most, cases Centrelink is seeking to recover overpayments in the absence of any finding of fraud on the part of the individual.

PILCH has received advice that Centrelink's current practice is contrary to the Act, and that Centrelink is first required to prove fraud before pursuing any debts that arose prior to bankruptcy.

PILCH is concerned that this practice is misleading and causes significant stress to individuals in financial difficulty, and has written to the Attorney-General's Department, the Department of Human Services and Centrelink requesting this issue be addressed.

The advice PILCH has received is set out below.

Background to Section 153 of the Act

Subject to provisions in section 153(2) of the Act, section 153 provides that where a bankrupt is discharged from bankruptcy, the discharge operates to release the bankrupt from all debts (including secured debts) provable in the bankruptcy, being debts arising prior to the date of bankruptcy.

Section 153(2)(b) of the Act

Section 153(2)(b) provides that the discharge of a bankrupt from a bankruptcy does not:

- (b) release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud ...

It would appear from the information received by PILCH from Victorian financial counsellors that Centrelink is relying on the provisions in section 153(2)(b) of the Act in those cases where it pursues debts for overpayment incurred prior to an individual's date of bankruptcy.

Meaning of 'Fraud' and Requirement to Prosecute Fraud Claim

"Fraud" is not defined in the Act. The requirement for a finding of fraud as a pre-condition to reliance on this section is also not expressly included in the Act.

However, case law demonstrates the view of the Courts that:

- the intended meaning of 'fraud' in section 153(2)(b) is malicious fraud; and

- creditors are required to obtain a finding of fraud prior to relying on section 153(2)(b) to pursue pre-bankruptcy debts.

Considerations Relevant to Centrelink Overpayments

Not all overpayments are caused by fraud

The current Centrelink practice appears to proceed on an assumption that all overpayments arise as a consequence of fraud on the part of the recipient. This is not a true reflection of the various causes of overpayments by Centrelink.

In some circumstances, a discharged bankrupt will have inadvertently misled Centrelink, or omitted to disclose information to Centrelink, without the fraudulent intent that is required by section 153(2)(b).

Failure to make a finding of fraud

From the case law, it is apparent that there must be a finding of Fraud. Arguably, this must be a finding by a court or tribunal. It is doubtful this can be satisfied merely by an opinion as to fraud held by Centrelink.

Legal Services Directions 2005 (Directions) – The Commonwealth's Obligation to Act as a Model Litigant

Centrelink is bound by the Directions, which set out the Commonwealth's obligation to act as a model litigant, requiring Centrelink to act honestly and fairly in handling claims and litigation and goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

A recently discharged bankrupt will likely lack sufficient funds required to properly defend any litigation by Centrelink in relation to alleged fraud. Such lack of funds is open to abuse in circumstances where Centrelink asserts that by the mere existence of section 153(2)(b) it is open to pursue pre-bankruptcy debts.

Conclusion and Suggested Action

The Act and the cases require a finding at law of actual fraud before a creditor can actively pursue debts incurred prior to the bankruptcy of an individual.

On this basis, Centrelink's current position of pursuing pre-bankruptcy debts is without proper basis and is contrary to the operation of section 153(2)(b).

Financial counsellors with clients who have recently been released from bankruptcy and are being pursued by Centrelink for pre-bankruptcy debts should provide those clients with the information set out in Annexure A, attached.

ANNEXURE A

INFORMATION SHEET FOR BANKRUPTS AND DISCHARGED BANKRUPTS IN RELATION TO PRE-BANKRUPTCY CENTRELINK DEBTS

Generally, a discharged bankrupt is released from any liability for all pre-bankruptcy debts.

However, Centrelink's current policy is to pursue pre-bankruptcy debts on the basis of section 153(2)(b) of the *Bankruptcy Act* 1966 (**Act**).

This section provides that the discharge of a bankrupt from bankruptcy does not release the bankrupt from a debt incurred by means of fraud.

In circumstances where Centrelink attempts to pursue a pre-bankruptcy debt, **and that debt was not incurred by fraud**, bankrupts and discharged bankrupts are advised to write to Centrelink.

Where applicable, the following information could be included in the correspondence:

1. The general proposition under section 153 of the *Bankruptcy Act* 1966 (**Act**) is that a discharged bankrupt is released from any liability for all debts provable in the bankruptcy.
2. That Centrelink has reinstated pre-bankruptcy debts in relation to overpayment on the basis of section 153(2)(b) of the Act.
3. That prior to reinstating these pre-bankruptcy debts, Centrelink must first prove that the debts were incurred fraudulently before relying on section 153(2)(b) to pursue them.
4. That Centrelink is not entitled to reinstate any pre-bankruptcy debt unless and until there has been a finding of actual fraud in relation to that debt.